

(2004) 01 CAL CK 0024
In the Calcutta High Court
Case No : Writ Petition No. 332 of 1996

Heavy Engineering Corporation Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 265
Customs Act, 1962 — Section 27

Citation : (2004) 167 ELT 396

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : B.S. Sinha Roy and V. Shaw, for the Appellant; R.K. Chowdhury, for the Respondent

Judgement

Amitava Lala, J.—The Court : This writ petition has been made by the petitioner, a Government of India Enterprise, challenging an order of appeal passed by Commissioner of Customs (Appeals), dated 31st July, 1995 rejecting the prayer for refund of excess amount and confirming the earlier order passed by the Assistant Collector of Customs (Appraising Refund Section).

2. The petitioner company required to import certain steel plates from abroad for carrying out its manufacturing business. Those steel plates are to be assessed for Customs Duty at the rates prescribed under the Customs Tariff Act. The ascertainment of Customs Tariff is dependable upon the quantity, nature, character and material composition. By a purchase order dated 7th February, 1990 MMTC imported 30 pcs. of Hot Rolled Plates from its Belgium Exporter and shipped it to a vessel under Bill of Lading No. Z-02, dated 6th April, 1990. The petitioner company purchased said plates from MMTC on High Seas basis. The Customs Authorities realised Rs. 62,57,236/- on account of duty and Rs. 27,89,527/- on account of interest totalling to Rs. 90,46,763/-. The said amount by mistake was considered H.R. plates as alloy steel plates as per tariff manual without checking the declaration given by the importer. Such H.R. plates are Non-

Alloy Steel Plates i.e. Mild Steel Plates thereby rate of Customs Duty is much lesser than the realised amount. The Assistant Collector of Customs (Appraising Refund Section) by an order dated 5th January, 1995 held that since the importer's application for refund has been received by the office after the expiry of six months from the date of payment of Duty, the claim is rejected as time-barred u/s 27 of the Customs Act, 1962. Section 27 of the Customs Act, 1962 speaks about the claim of refund duty. In Sub-section (1) therein I find that application for refund will be made within the time framed as given thereunder as follows :

(a) in the case of any import made by any individual for his personal use or by Government or by any educational research of charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months.

3. An appeal was preferred from such order whereunder two points were formulated for the purpose of due consideration :

(i) whether the duty was paid under mistake of law?

(ii) whether rejection of the refund claim is time-barred?

4. The Commissioner of Customs (Appeals) held that so far the question of mistake of law, the determination does not fall within the purview of the forum. It can only be determined by Court of law. Therefore, rejection of claim is justiciable as the authority cannot go beyond his competency under the Act. Such Appellate Authority relied upon two Supreme Court decisions and ultimately held that if the payment of duty is made under a mistake of law, the remedy does not lie with the departmental authorities but with the Civil Court. Accordingly, the appeal was rejected.

5. According to me, the appellate authority passed the order under undue haste. The original claim was rejected being time-barred. Therefore, unless the delay condoned there is no scope of the authority to go into the question of recovery of purported excess Customs duty. The appellate authority did not adjudge the issue even after formulating the point and thereby committed a mistake in realising the point to come to an appropriate conclusion. In other words, he completely by-passed the issue. By now, it is well settled that delay can be condoned by the Court of law unless such power is given to any authority. This proposition is applicable whereunder the applicability of Limitation Act is available. The general proposition is that unless specified no forum other than Court can condone the delay. The reference of the Supreme Court was not truly interpreted by the authority concerned. Upon going through the ratio of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, it appears that when refund of duty recovered without the authority of law, the general principle of limitation will be applicable but when the authorities are proceeding under the Act it will proceed under the provisions laid down therein.

Therefore, the important feature for the purpose of coming to conclusion by the authority as well as the appellate authority is whether the amount recovered without the actual provision of the tariff schedule of the Customs Authority or not. Such question will prevail over and above the question of making an application within the prescribed period as given under the law. Article 265 of the Constitution of India prescribes the taxes cannot be imposed save by authority of law. No tax shall be levied or collected except by authority of law. Even if I go by Section 23 of the Indian Contract Act, it says that the consideration or object of an agreement in law is lawful unless it is forbidden by law or is of such a nature, if permitted, it would defeat the provisions of any law. In such of these cases, the consideration and object of an agreement is said to be unlawful. Even agreement of which the object or consideration is unlawful is void. In the legal battle, according to me, one has to proceed step by step to achieve the goal. Such steps are provided in the law. The law is to be truly interpreted to think about the sequence of a claim in between the parties. Question of nullity is a product of void principle whereas question of limitation is a product of voidable principle. A Court or Tribunal or forum of any authority can condone the delay whenever it is applicable in the law or wherever the condonation expressly or impliedly provided for the sake of justice. As soon as the delay is condoned the claim of either of the parties gets its life for due consideration. But when the claim is void, the same is void for ever. No delay or defect can be condoned by operation of law. Therefore, in between two questions whether duty will be refunded due to illegal collection or such claim of refund is time-barred, the determination of the first question should prevail before an authority. Therefore, without adjudging such part on refund ignoring the genuinity of the collection of levy or tax or duty will definitely hit by the provision of Article 265 of the Constitution of India which gives rise to the question of "unjust enrichment". In other words question of "unjust enrichment" is a question of nullity which applies for ever irrespective of the question of limitation. The Constitution of India being fountain-head of all laws speaks that no tax shall be levied or collected except by authority of law. The appropriate authority under fiscal laws will be bound to ascertain at first whether the claim is just or not. If apparently claim appears to be unjust such authority cannot ignore the claim without considering it but for limitation because the State cannot be unjustly enriched at the cost of the citizen. Duty paid under mistake of law is duty recovered without authority of law and jurisdiction. In (*Salonah Tea Company Ltd. v. Superintendent of Taxes, Nowgong and Ors. Etc.*) the Supreme Court held normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution of India, the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. It is true that in some cases the period is fixed beyond which Court should not grant relief but that is not an inflexible rule. It was further held that normally speaking in a society governed by Rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law it follows that taxes collected without the authority of

law as in this case from a citizen should be refunded because no state has the right to receive or to retain taxes or monies realised from citizens without the authority of law. In this case indisputably it appears that tax was collected without the authority of law. Indeed the appellant had to pay the tax in view of the notices which were without jurisdiction. In the previous it is manifest that the respondent had no authority to retain the money collected without the authority of law and as such was liable to refund.

6. The respondent authorities, on the other hand, argued that writ Court is not proper forum for adjudication of classification dispute which necessarily factual investigation as to the technical, chemical composition of the goods involved, their uses and how they are commercially sold and dealt with. They further contended that the jurisdiction under Article 226 is indeed extraordinary. The Court does not normally interfere if adequate alternative remedies as available.

7. In a reply thereto, it has been contended by the petitioner company that CEGAT being the statutory tribunal under the Customs Act, 1962 is bound by the provision laid down under the said Act. It cannot have any unfettered right to consider whether the case will be governed by the statutory limitation or general law of limitation. Such question can only be decided by the writ Court. "Unjust enrichment" is a mistake of law committed by the authority which has to be governed by the general law of limitation and cannot be governed by Section 27 of the Customs Act. He relied upon Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, to establish that in case of any illegality there cannot be any bar for the writ Court to interfere in the matter and pass an appropriate order in connection thereto in spite of having alternative forum. Learned Counsel appearing for the petitioner before concluding the same contended before this Court that whenever it was detected by the petitioner that an excess amount has been recovered by the authority, the application has been made before it to consider the case of refund well within the prescribed time as given by the law of limitation which will be otherwise applicable herein. Mistake of law cannot be guided by the statutory limitation but by the general law of limitation.

8. According to me, Provisions of Limitation Act, 1963 is applicable to "Court" but not to the statutory authorities unless it is provided by the law. But, there is no embargo for the authority in following the principles of Limitation Act in a given case. This is such a case where the question of nullity will be survived unless and until general principles of limitation is made applicable. Be it classification dispute or be it mistake of law that part has to be gone into by the CEGAT by applying general law of limitation. I have already indicated that the question of nullity being void in nature, no law prescribed as yet to restrain any void claim unlike the voidable claim. Therefore, the CEGAT is entitled to go into the question of "unjust enrichment" ignoring the question of the statutory limitation. Incidentally, it is to be remembered that both the claimant and the authority are either instrument of the Government or pure Governmental authority. It is not desirable that this type of dispute should not be persisted amongst themselves.

It is further to be remembered that rejection, as made, by the original authority relates to making application beyond the period of six months without ascertainment of the factum that whether the period of six months is appropriate in the case of a Government instrumentality or one year. However, if the application, as made by the petitioner company even beyond the period of one year such principle may not be applicable. The authority concerned did not consider the same apparently as available in the record. Therefore, even the rejection as made by the authority and the appellate authority on that score cannot be said to be free from doubt leaving aside the part of applicability of general principles of Limitation. If I follow the procedure correctly in case of refund, the Court under Article 226 of the Constitution of India, has power to direct refund unless there has been avoidable laches and in doing so the Supreme Court has given a guideline not to follow the inflexible rule particularly when the prayer is made within the three years period which are normally for the purpose of due consideration of the cases. Here admitted position is that the application for refund was made within the period of three years from the date of knowledge. Therefore, there is a sufficient ground for the petitioner company to raise its grievance before the authority. In doing so if Section 27 of the Act is read with the guideline of the Supreme Court, it will be interpreted that Section 27 may not be rigidly followed in an appropriate case. A case of "unjust enrichment" is definitely one of such cases as interpreted above for the purpose of due consideration without being hit by time frame as given u/s 27 of the Customs Act.

9. Therefore, I set aside the order of the Customs authority and the Appellate authority on the ground of limitation. But in doing so, I am not directing the authority to refund the amount. On the other hand, I direct the petitioner company to make an application to the CEGAT for the purpose of coming to an appropriate conclusion in respect of merit of the case. Such application will be made within a period of two weeks from the date of communication of this order. The CEGAT will convert such application into an appeal and give the de novo hearing in respect of the merit of the case and decide the issue once for all within a period of two months from the date of filing of the application by the petitioner. There will be no order as to costs.

10. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisities for drawing up and completion of the order and certified copy of this judgment.

11. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.